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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.M., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

MELISSA G.

Defendant and Appellant.

G045753

(Super. Ct. No. DP019337)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Maria D.
Hernandez, Judge. Affirmed

Marsha F. Levine, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J.
Agin, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

In this appeal, Melissa G. challenges the juvenile court's second dispositional order, which placed her son, J.M., in the custody of his father, Gregory M., as well as its decision to provide her with only monitored visitation after termination of jurisdiction. These rulings followed our remand of the case after Gregory's successful appeal from the court's first dispositional order, which had placed J.M. in foster care. (*In re J.M.* (Feb. 25, 2011, G043723)[nonpub. opn..])

Melissa contends the court erred by refusing "to permit her to present testimonial evidence and otherwise participate at the [second] dispositional hearing" based upon its alleged "erroneous belief that this Court had remanded the matter solely to conduct a new dispositional hearing with respect to [Gregory.]" She contends the court also erred by declining to conduct a "contested hearing before terminating dependency jurisdiction and issuing exit orders."

We find these contentions unpersuasive, and affirm. The juvenile court properly interpreted our directions on remand from the prior appeal. Our reversal of the prior dispositional order was based on our determination the court had erred by failing to evaluate Gregory *separately* from Melissa, for purposes of assessing whether J.M. should be removed from parental custody – and that while there was substantial evidence to support the finding J.M. should be removed from *Melissa's* custody, Gregory had been correct in asserting there was no substantial evidence to support that finding with respect to him. Thus, our conclusion was that the proper outcome of the first disposition hearing should have been an order returning J.M. to Gregory's custody. Consequently, we remanded the matter with directions to make such an order, while at the same time acknowledging that the nature of juvenile proceedings is dynamic, not static. Specifically, we ordered the juvenile court to "make a new dispositional order placing J.M. in Gregory's custody *unless facts and circumstances occurring since the prior dispositional order* demonstrate that *continued out-of-custody placement* is necessary." (*In re J.M., supra*, G043723, italics added.)

In other words, the juvenile court's options on remand were: (1) to place J.M. in Gregory's custody; or (2) if new facts and circumstances demonstrated that placing J.M. in Gregory's custody was not appropriate, to *continue* the foster placement which had been ordered at the first hearing. As we had already determined the juvenile court had acted appropriately in refusing to place J.M. in Melissa's custody at the first dispositional hearing, we did not require it to revisit that specific issue on remand. Hence, because the only evidence Melissa proffered at the remanded dispositional hearing was characterized as supporting *her own claim* for custody, the court did not err by declining to consider it.

We likewise reject the assertion the court erred by failing to hold a "contested evidentiary hearing" before terminating dependency jurisdiction and issuing exit orders. Although Melissa was specifically notified, well in advance of the final hearing, that the Orange County Social Services Agency (SSA) was recommending termination of jurisdiction with an order allowing her only monitored visitation, and she had also been warned by the court itself that "visitation" would be the primary issue to be addressed at that final hearing, she never sought to introduce any evidence concerning visitation at the hearing – let alone requesting a special "contested evidentiary hearing" on the issue. The court does not err by failing to convene a special hearing no one has requested, or by failing to consider evidence no one has offered.

FACTS

J.M. was born in December of 2006, and his parents, who are unmarried, have been engaged in conflict ever since, including a lengthy custody battle in family court. J.M. was first referred to Child Protective Services in January of 2007, on a claim of alleged general neglect by both parents, based upon an incident in which "the child's mother thrust the child at the father in anger, destroyed father's personal property, and physically struggled with the father."

Nothing improved after that, and Gregory and Melissa have been unable to negotiate their shared custody of J.M. SSA finally filed a jurisdictional petition in January of 2010, and took J.M. into protective custody. The amended jurisdictional petition alleged that J.M.'s parents, Gregory and Melissa, "failed to protect" him (Welf. & Inst. Code, § 300, subd. (b).) The petition alleged as supporting facts that: (1) Both parents have alleged abuse by the other to various police agencies. The various allegations of abuse have "resulted in . . . [J.M.], being subjected to multiple sexual assault exams, child protective services interviews, police interviews, and arguments between parents, which is detrimental to the child's emotional health and well being"; (2) During the period between the child's birth in December of 2006 and January of 2010 (three years), Melissa "has subjected" J.M. to "at least one hundred and twenty three" examinations by medical professionals. "Said behavior places the child at serious risk of emotional harm"; (3) "In [an Evidence Code section] 730 evaluation, Dr. Gerardo Canul [found] that the father has difficulty coping with the ongoing custody conflict with the mother and has difficulty with identifying, managing and expressing his emotions"; (4) "In [an Evidence Code section] 730 evaluation, Dr. Gerardo Canul found that the mother has serious personality problems that have negatively affected her parenting skills and decision making. She was also found to have poor emotional management and low insight"; (5) Melissa "placed Mickey Mouse ink stamps on the child's biceps, lower back, stomach and chest, on either side of his inner thighs, on his buttocks and also next to the anus, in an effort to guilt the father into not abusing the child"; and (6) The parents have "an ongoing conflictual relationship, which on numerous occasions has escalated into incidents of verbal and physical domestic violence in the presence of the child." (*In re J.M.* (Mar. 23, 2011, G044058) [nonpub. opn.].)

Both parents pleaded nolo contendere to the jurisdictional petition, and the court set the matter for a contested dispositional hearing. At the conclusion of the hearing, the court found the dysfunctional relationship between Gregory and Melissa was

harmful to J.M. and warranted his removal from the custody of both of them. The court explained to Gregory and Melissa “I want your child to be home with you, *both of you*, but I will tell you, each of you, that based on what I’m seeing here, the chances of that happening are extremely unlikely unless *both of you* commit yourselves to working on this case towards reunification at least as hard as you folks have been working against each other all this time [¶] . . . If you folks commit yourselves to doing this and you’re able to set aside your egos . . . then I think *you both* can be successful and have your child back. [¶] But I’m telling you if I don’t see that happening, you’re never going to have your child back and somebody else is going to adopt your child” (*In re J.M.*, *supra*, G044058, italics added.)

The court then found by clear and convincing evidence that J.M. could not safely be maintained in the custody of either of his parents, for the reasons set forth in Welfare and Institutions Code section 361, subdivisions (c)(1) and (c)(3), and that reasonable efforts were made to prevent or eliminate the need for J.M.’s removal from parental custody.

Both parents appealed that order, although Melissa’s appeal was subsequently dismissed. Gregory’s chief arguments on appeal were (1) the evidence was insufficient to support a determination J.M. could not be safely maintained in his custody, separate from that of Melissa; and (2) the court erred in holding both parents equally responsible for their dysfunctional relationship, without determining whether his conduct had actually been a reasonable response to Melissa’s allegedly unstable behavior.

Gregory also filed a motion in the juvenile court, seeking reconsideration of its dispositional order. His motion relied upon additional evidence, not available at the time of the dispositional hearing, which he contended demonstrated that Melissa had “a history of conflictual relationships involving . . . the need to engage law enforcement”; that she had “a history of being emotionally unbalanced”; and that she had “committed

perjury during trial.” (*In re J.M., supra*, G044058.) The court denied the motion without a hearing, and Gregory appealed that order as well.

Then, on February 25, 2011, we issued our opinion resolving Gregory’s first appeal, in which we reversed the court’s dispositional order, and instructed the court to issue a new dispositional order placing J.M. in Gregory’s custody unless facts and circumstances occurring since the prior dispositional order demonstrated that continued out-of-custody placement was necessary. (*In re J.M., supra*, G043723.)

In that earlier opinion, we concluded there had been sufficient evidence submitted in connection with the first dispositional order to sustain the juvenile court’s conclusion that J.M. should be removed from Melissa’s custody, and thus we found no basis to disturb that conclusion. However, we explained the court had erred by essentially treating Melissa and Gregory, who are not together as a couple, as though they comprised a single parental unit, and then assessing only whether J.M. could be safely returned to their *shared* custody. We concluded the court was obligated instead to assess whether J.M. must be removed from the custody of each parent, separately, before ordering that he be placed in foster care. Applying that standard, we determined the court had insufficient evidence before it at the disposition hearing to sustain the determination J.M. couldn’t be returned to *Gregory’s* custody – and thus the court had erred in ordering he be removed from Gregory’s custody and placed in foster care.

Hence, our remand directed the juvenile court to place J.M. *in Gregory’s custody*, unless the court found that new facts or circumstances occurring since the first dispositional hearing demonstrated that J.M. could not be safely returned to Gregory’s custody, and that J.M. should be continued in his “out-of-custody” placement instead. We subsequently dismissed Gregory’s second appeal as moot. (*In re J.M., supra*, G044058.)

After remand, first Gregory, and then Melissa, filed successful petitions to disqualify judicial officers, and on April 29, 2011, the matter was reassigned to a new

judge. On that same date, the court also set the matter for the second dispositional hearing on May 9, 2011. And in connection with that May 9 hearing, SSA requested a 60-day continuance to allow time for J.M. to be transitioned back into Gregory's home and the situation to be evaluated.

At the May 9, 2011 hearing, the court stated "my understanding from the D.C.A. is that I'm going to be making dispositional orders after the reversal with the presumption that it is return to the care and custody of father unless there are circumstances presented to this court that are different from the original dispositional hearing." The parties generally agreed with that characterization, although Gregory's counsel sought to clarify that in his view, return to Gregory's custody was mandatory, because "there [are] insufficient facts since May 5, 2010, . . . to show that there is clear and convincing evidence that this child cannot be placed with father" SSA agreed with Gregory, and its counsel further noted that it had not "identif[ied] any different circumstances" which would warrant keeping J.M. out of Gregory's custody, and was thus just asking the court to provide for a slow transition to "facilitate" J.M.'s return to Gregory's custody on or before June 9.

The court explained that with such a huge record of prior proceedings in the case, it would need time to become familiar with the matter and with J.M.'s circumstances, and it continued the hearing until June 9, 2011. Thereafter, there were additional continuances of the dispositional hearing.

On July 25, 2011, in connection with a dispositional hearing then scheduled for the next day, SSA filed a disposition report reflecting a change in its recommendation for the case. Instead of recommending the court continue jurisdiction after the second dispositional hearing, to allow for a slow and monitored transition of J.M. into Gregory's custody, SSA recommended instead that custody of J.M. simply be returned to Gregory, and jurisdiction be terminated with exit orders. SSA recommended that Melissa continue with weekly monitored visitation, after noting some problems she had caused for the

professional monitors, as well as third parties, during her prior period of monitored visitation with J.M.¹ Gregory filed a written response to SSA's changed recommendation, but Melissa did not.

At the hearing on July 26, 2011, the court again continued the dispositional hearing, to August 30, 2011. The court noted that in light of SSA's changed recommendation, the hearing on that date would be primarily "about the visitation." The court explained that it expected to "terminate dependency" at the next hearing, and advised the parties to "focus[] on what they are presenting for that hearing when we come back on the 30th with respect to visitation."

At the August 30, 2012 dispositional hearing, all parties, including Melissa, stipulated to a proposed order terminating jurisdiction, while striking out a provision stating that custody of the child was to remain with Gregory. Melissa's counsel noted on the form next to his signature a non-specific "request to be heard." During the hearing, Melissa's counsel informed the court that Melissa "is requesting to be allowed an opportunity to request return [to her.] If the court would allow her a dispositional hearing, she would be requesting return. I have provided to the court and to counsel several witnesses which mother would intend to call. . . . [¶] . . . Should the court deny mother's request to have a contested dispositional hearing as to the return of the child to her, mother would like to note her objection to such a ruling." The court rejected Melissa's request, noting that in accordance with "the opinion that has been issued by [the District Court of Appeal], this court is to address the issue of disposition as to father only."

¹ In the report, SSA explained that as of July 18, 2011, Melissa's visits were "suspended" until another visitation center could be located, since the one the family had been using refused to extend Melissa's visitation there. It was reported that Melissa had been continuously "rude to other families and staff, ignored/intentionally defied those rules set forth at the Visitation Center and disrupted the Visitation Center by taking the attention of the supervising staff."

The court then stated it would be ordering J.M. placed in Gregory's custody, unless the parties had anything additional to add or any record to make with respect to Gregory. Both SSA's counsel and J.M.'s counsel, explicitly agreed with the proposed placement, and Melissa's counsel did not offer any argument against it. The court then specifically explained to Melissa's counsel, "for the record," that "based on the totality of these circumstances and what I have before me, I would not be returning to mom at this time under the facts and circumstances that this court is aware of; it would not be in [J.M.'s] best interests to return to mother."

Turning to the issue of visitation, the court stated it "intend[ed] to maintain monitored visitation for mother until we have significant progress for mom. . . . [T]his case will be turned over to the family law court jurisdiction, and should there be issues . . . regarding any type of visitation, custody or otherwise, [it] can be revisited with those courts" In response, Melissa's counsel noted she had submitted a report from a proposed visitation monitor, and explained Melissa did not have the financial capacity to pay for a professional visitation monitor. Thus, Melissa was requesting the court assess the non-professional she proposed to act as the visitation monitor. Melissa herself then addressed the court, but instead of speaking about the visitation issue, she argued with the court about the merits of the dependency case itself. The court explained that the jurisdictional phase of the case had been resolved long ago, and consequently the issues she was raising were not pertinent.

The court acknowledged Melissa's concerns about the financial expense of a professional monitor, and then suggested that expense might be ameliorated through mediation. However, the court refused to consider a non-professional monitor at that time. The court then issued its order, terminating jurisdiction and adopting SSA's recommendations as set forth in its July 26, 2011 report.

I

Melissa's first contention is that the juvenile court erred by refusing to consider whether J.M. should be returned *to her* at the second dispositional hearing, which followed our reversal of the initial dispositional order. Her primary contention is that the juvenile court misunderstood the scope of issues it was required to consider in that second hearing. As we have already explained, that contention is incorrect. The court accurately interpreted our directions on remand, which were to order J.M. placed *in Gregory's custody* – the disposition we concluded should have been the result of the first hearing – unless some change in circumstance since that first hearing demonstrated that placement with Gregory would be inappropriate.

Because we had concluded that the court's initial decision not to place J.M. in Melissa's custody had been fully supported by the evidence before it at the first dispositional hearing, we did not direct the court to reconsider that issue after remand. Stated plainly, Melissa had her day in court on the dispositional issue, and in the absence of some error – and there was none pertaining to her – she was not entitled to a second.

Melissa's second contention is that even if the juvenile court correctly followed our directions on remand, it nonetheless *misled her* about the scope of the dispositional hearing it intended to hold. She asserts it was “[n]ot until August 30, 2011 [that] Judge Hernandez [said] she was proceeding with the dispositional hearing based on this Court's instruction that she ‘rehear the dispositional hearing *as to father's issues*.’” This contention is unpersuasive.

As we have already noted, the judge, newly assigned to the case, made clear at the first hearing following her assignment – on May 9, 2011 – that, “my understanding from the D.C.A. is that I'm going to be making dispositional orders after the reversal *with the presumption that it is return to the care and custody of father unless there are circumstances presented to this court that are different from the original dispositional hearing.*” (Italics added.)

The “presumption” of return to Gregory’s custody means that any evidence offered – limited to fact and circumstances occurring after the original dispositional hearing – must undermine that *presumed* disposition, rather than merely argue that other alternatives, such as placement with Melissa, were also available.

The juvenile court never wavered from its initial – and correct – interpretation of its obligations in connection with the remanded dispositional hearing. Indeed, at the hearing on July 26, 2011, the court went so far as to inform the parties that in the wake of SSA’s new recommendation that J.M. should be returned to Gregory’s custody and jurisdiction terminated, the main issue to be addressed at the hearing rescheduled for August 30, 2011 was “visitation.” Melissa is simply incorrect in suggesting the court’s statements at the August 30, 2011 hearing, explaining its refusal to consider placement of J.M. in her custody, were a surprise.

We find no error in the court’s decision to conduct only a limited reconsideration of disposition on remand, and no error in its order placing J.M. in Gregory’s custody.

II

Melissa’s second argument is that the court erred by failing to give her “a contested evidentiary hearing before terminating dependency jurisdiction and issuing exit orders to the family law court.” (*Italics omitted.*) However, we first note that Melissa *stipulated* to the termination of jurisdiction in connection with the August 20, 2011 hearing – although not to the placement of J.M. in Gregory’s custody. Consequently, Melissa cannot be complaining about the fact of termination. We therefore assume Melissa is concerned specifically about the court’s “exit order” giving her monitored visitation only.

Melissa does not cite any authority suggesting a special “contested evidentiary hearing” concerning visitation is required in all juvenile cases prior to termination of jurisdiction, whether or not a parent requests one. Instead, the cases she

relies upon merely hold that a juvenile court abuses its discretion when it *refuses to consider* the relevant evidence actually proffered by a parent in connection with visitation prior to the termination of jurisdiction. (*In re Roger S.* (1992) 4 Cal.App.4th 25, 31 [“The trial court here, by refusing to accept evidence relevant to the visitation order, was in danger of issuing an uninformed order which could fail to serve the best interests of the child.”]; *In re Michael W.* (1997) 54 Cal.App.4th 190, 196 [juvenile court errs by making “a deliberate decision to impose artificial restrictions on the parties’ ability to bring relevant evidence to the attention of the court.”].)

In this case, by contrast to those Melissa relies upon, there is no evidence the court precluded her from offering any evidence pertaining to visitation. She was clearly on notice, for more than a month prior to the hearing at which the court terminated jurisdiction, that the primary issue for her to address would be visitation. Moreover, after Melissa’s counsel did argue to the court about the visitation issue – asserting that the court should allow Melissa to use a non-professional monitor, due to financial concerns – the court gave Melissa herself the opportunity to address the court directly. Unfortunately, Melissa took that opportunity to argue about jurisdiction, rather than express her concerns about the proposed exit order on visitation.

There is simply no evidence in the record before us that the juvenile court either thwarted Melissa’s efforts to address the visitation issue prior to termination of jurisdiction, or refused to consider any relevant evidence pertaining to the issue. Consequently, we find no error in its handling of the issue.

DISPOSITION

The juvenile court's order placing J.M. in Gregory's custody, and terminating jurisdiction with exit orders, is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.